IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
IN ITS JURISDICTION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA

CRIMINAL WRIT PETITION NO.1651 OF 2006

Charles Patrick ...Petitioner
Vs.
The Union of India & Ors. ...Respondents

Mr. Maqsood Khan i/b. M/s. Khaitan & Co. for Petitioner
Mrs. A.S. Pai, with Mr. J.C. Satpute for Respondents 1,2 and 6.
Mr. D.S. Mhaispurkar, Addl. P.P for the State.

CORAM: DR. S. RADHAKRISHNAN &
SMT.ROSHAN DALVI, JJ.
DATED: 2ND NOVEMBER, 2007

JUDGMENT (Per Smt. Roshan Dalvi, J.)

1. The Petitioner has challenged the Detention Order No.673/06/2006- CUS VIII dated 5th May, 2006 issued by the Joint Secretary, Government of India, Ministry of Finance, Department of Revenue, New Delhi under Section 3(1) of The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) , and has applied for the issuance of writ of Hebeas Corpus or any other appropriate Writ, Order with direction for quashing and setting aside the impugned order.

2. The impugned order dated 5th May, 2006 came to be issued upon receipt of certain intelligence reports relating to export transactions of the Petitioner's Company M/s. Sai Shradha Exim Pvt. Ltd. The company premises was searched on 29th November, 2005 resulting in incriminating documents showing exported pharmaceutical drugs to the extent of Rs.10 crores, corresponding DEPB of Rs.1.15 crores was claimed on the aggregate value of the said goods. Those goods were declared as pharmaceutical drugs to the extent of value of Rs.1.52 Crores manufactured by one M/s. Surya Pharmaceuticals under its DEEC license.

3. The Detention Order shows that the invoices recovered under the said search showed purchase of soapstone powder and empty carbuoys (barrels) delivered to the godown of one M/s. Petrosolv India Company (Petrosolv) at Mhape, New Mumbai. On 30th November, 2005 a panchanama was executed, statements were recorded, certain documents were seized and the deliveries of certain drums of pharmaceutical drugs were detained. Thereafter, statements of several witnesses came to be recorded and further panchanamas were prepared. One statement specifically relied upon by the Detention Authority in para 3 of the Detention Order is that of one Anand Divekar, an employee of Petrosolv. A

panchanama as well as seizure memo were prepared and certain labels, papers and other documents were seized on 30th November, 2005. Statement of Divekar shows that he changed the labels on the barrels and delivered them to various purchasing parties on cash and consequently diverted the exported goods into local market.

4. Similarly statements of one Subramaniam as well as one Chirag Junjani, export assistants in their company i.e. M/s Petrosolv came to be recorded. This led to the search of four offices including that of the Petitioner, resulting in recovery of various export documents like purchase invoices, ledger extracts of packing material and computerised extracts of sale/purchase of Petrosolv, which were recovered under panchanama dated 30th November, 2005.

5. The search of the premises of Petrosolv resulted a recovery of huge quantity of soapstone powder actually sought to be exported as pharmaceutical products for which certain panchanamas were drawn on 30th November, 2005 and 8th December, 2005.

6. 118 drums of pharmaceutical drugs containing Ampicillin and Amoxycillin worth about 30 lakhs stated to be for export but diverted to various companies in India including that of

the Petitioner were found. Consequently those goods came to be detained under panchanama dated 30th November, 2005. The Detention Order shows that the goods of M/s Nimesh Pharma were delivered in the premises of one M/s. Sagar Warehousing Company. The details of these goods were found to be tallying with the despatch details of one BLR India Ltd., except that the vehicle number entered in the records was different. Since the vehicle number was found to be different, a statement of one Sambhaji Desai came to be recorded, which shows that this was as per the instructions of one Bhavin Timbadia @ Jimmy, who works with the Petitioner.

7. It is the Petitioner's case that several documents referred to and relied upon by the Detaining Authority are not enumerated in the list of documents annexed to the Detention Order and do not form part of the compilation of documents served upon the Petitioner. It is contended by Mr. Khan on behalf of the Petitioner that this fact shows that order itself is not passed by the Detaining Authority and has been copied from elsewhere without application of mind. To this end Mr. Khan has sought to show the documents not forming a part of the list of Documents, though contained in the Detention Order. He contends that these documents are both “referred to AND relied upon” by the Detaining

Authority.

(a) *It is contended on behalf of the Petitioner that the copies of statement of Sambhaji Desai as well as Jimmy have not been served upon the Petitioner though they are referred to and relied upon by the Detaining Authority in para 4(c) of the Detention Order. It is also his case that the copy of the panchanama dated 8th December, 2005 has not been served upon the Petitioner.*

8. The aforesaid Detention Order shows how intelligence was received based upon which premises were searched, recoveries were made, premises of other concerns involved in the transactions were also searched on 30th November, 2005 and panchanamas as well as seizure memo were prepared. The aforesaid Detention Order also shows how goods which are shown to be soap stone powder came to be passed off as pharmaceutical products for export though they were otherwise diverted to local market. The Petitioner has no grievance about the fact that the statements of the aforesaid Chirag, and Anand Divekar have been recorded and copies of them were given to the Petitioner. The Petitioner also made no grievance that the panchanama in the seizure memo dated 30th November, 2005 have been supplied to the

Petitioner.

9. This forms the basis of the Detention Order, based upon the aforesaid panchanamas and recoveries made there under on 30th November, 2005. It came to be seen that the details of the vouchers and receipts of the transactions of the pharmaceutical products between two companies M/s. Nimesh Pharma and Sagar Warehousing Company were tallying except for the vehicle number. Such tallying was done by the Officers of the Sponsoring Authority without reference to any further statements. Since the details in the values and the receipts were indeed tallying except for the vehicle number, the statements of Sambhaji Desai and Jimmy came to be recorded thereafter showing that fact.

10. It can be seen that these documents show that the drums of pharmaceutical drugs which were containing Ampicillin and Amoxycillin of Rs.30 Lakhs from Petrosolv was actually diverted to the local market instead of being sent under the shipping bills got prepared by the Petitioner. The statement of Jimmy dated 30th November, 2005 referred to in paragraph No.8 of the Detention Order only shows his admission of the purchase of drums and a further admission of even past purchases to the extent of 1.5 Crores showing goods meant for export to be diverted to the local market for

which Petrosolv did not issue bills or delivery challans and made payment in cash.

11. Consequently it is seen that the Detaining Authority has not relied upon the statement of Jimmy to come to that conclusion also. The officers of the Sponsoring Authority have actually detected his fraud by the aforesaid documents. In support of such fraud the said Jummy made admissions in his statement. The statement of Jimmy is, therefore, merely referred to by the Sponsoring Authority, the Detention Order is not passed based upon that statement.

12. The Detention Authority has, therefore, relied upon the statements of Chirag and Divekar as well as the panchanama of the seizure memo dated 30th November, 2005 and the efforts of the officers of the Special Authority in searching various premises, extricating documents therefrom and collating them to find that they were tallying but for one particular, containing the vehicle numbers. The Detention Authority has, therefore, only referred to the fact that the aforesaid two statements came to be recorded showing the fact ascertained by the Officers of the Sponsoring Authority. The Detention Authority has not relied upon the statements of Sambhaji Desai and Jimmy. The Sponsoring Authority has only recorded their statements after finding out the fact of such non-tallying, which was reflected from the receipts and

vouchers of the related concerns. The Detaining Authority has supplied to the Petitioner all the aforesaid documents relied upon by him and not the copies of the two statements which came to be made justifying the conclusions of the officers of the Sponsoring Authority which were merely referred to in the Detention Order.

(b) *It is the Petitioner's case that the statement of Abhimanyu showing to be dated 12th December, 2005 has not been served upon the Petitioner. There is a typographical error in the said date. It has to be read as 20th December, 2005 instead. The statement refers to an earlier statement dated 9th December, 2005 and not 12th December, 2005.*

(c) *It is the further case of the Petitioner that the copies of 14 shipping bills were not served upon the Petitioner.*

13. The Detention Order shows that the search of the office premises of Nimesh Pharma on 30th November, 2005 resulted in recovery of sale/purchase documents pertaining to the diverted goods purchased from Petrosolv under panchanama dated 30th November, 2005.

14. Chirag in his statement admitted the involvement of Petrosolv in the diversion of export goods and substituting the pharmaceutical products with the soapstone powder. He produced 8 files annexed to the letter dated 2nd December, 2005 containing xerox copies of export documents and petty cash vouchers and mentioned about how the export drums with soapstone powder were labelled and sealed in the Mhape godown of Petrosolv.

15. The panchanama dated 30th November, 2005 refers to white powder. It was sent for analysis. The goods which were diverted to the local market have tested positive for Ampicillin and Amoxycillin. The goods which were to be exported have tested negative for amoxycillin, tryhydrate and saphasoxil which were purportedly the products to be exported. The result of the test report, has shown white powder. The test also shows that lumps were found. The Analyst's report has been furnished to the Petitioner. The Detaining Authority has therefore, rightly concluded that though pharmaceutical goods were sought to be exported under the 14 shipping bills of the Petitioner, actually white soapstone powder was in fact exported. The DEPB, which was availed of to the extent of Rs.1.15 Crores upon the goods declared as pharmaceutical drugs, were valued at Rs.1.5Crores and the exports which were sought to be made

of an aggregate value of Rs.10 Crores were, therefore, fraudulently obtained.

16. The Detention Order shows that the verification of petty cash vouchers was for payment of one Abhimanyu Singh by Petrosolv. These vouchers were signed by the Petitioner and the amount in cash was received by Abhimanyu. Abhimanyu's statement has also been recorded and copy has been furnished to the Petitioner.

17. The Detention Order further shows that the job works done for the export consignment were cleared from the factory of Tini Pharma. The vouchers and invoices were found to tally.

18. Our attention is drawn by the learned A.P.P to the fact that these figures and the job numbers are annexures to the statement of the Petitioner himself dated 3rd December, 2005 and forms a part of the documents supplied to the Petitioner.

19. Therefore, the case against the Petitioner in the Detention Order is that though the figures of the export invoices which tallied, and which the Petitioner himself has relied upon, showed the details of the drums showing the white powder, the 14 shipping bills allegedly purporting to export those

goods showed otherwise, reflecting fraudulent exports. It is, therefore, seen that the Detaining Authority has relied upon the figures and the export invoice numbers but not the 14 shipping bills to pass the Detention Order. The 14 shipping bills containing false information of the fraudulent exports which the Petitioner himself got prepared are hence, shown to be fraudulent from the figures of the invoices which the Detaining Authority relied upon. The Detaining Authority has only made a reference to 14 shipping bills to show the anomaly between the documents of the Petitioner fraudulently got prepared and the other business documents of the Petitioner exposing the fraud. The Detaining Authority cannot and has not relied upon the 14 shipping bills. The shipping bills cannot show the acts of the Petitioner in diverting the goods purportedly shown for export to the local market, which is the main charge against the Petitioner. The figures and the export invoice numbers for the job work done and the consignments that followed expose the act of the Petitioner. They alone are, therefore, relied upon by the Detaining Authority to pass the Detention Order against the Petitioner.

(d) *It is the case of the Petitioner that though the copy of the panchanama of 30th November, 2005 has been furnished, the copy of the panchanama of 8th December, 2005 has not been furnished to the Petitioner.*

20. Paragraph 4(d) of the Detention Order shows a further search carried out by the Sponsoring Authority which resulted in documents showing details of procurement of soapstone powder, procurement of empty drums and filling of the drums which resulted in different transactions for which panchanamas came to be drawn on 30th November, 2005 and 8th December, 2005.

21. Therefore, a reading of the aforesaid para shows that the acts of the Petitioner were the same. Only further documents of similar nature came to be recovered later on 8th December, 2005 also. The Detaining Authority has passed the Detention Order based upon the acts of the Petitioner which is amply demonstrated by the documents recovered in the panchanama as well as the seizure memo dated 30th November, 2005 itself. The documents recovered on 8th December, 2005 are much the same and only adds to the extent of the Petitioner' activities but does not show anything new.

22. Hence, paragraph No.11 of the Detention Order shows that the same things were recovered under a panchanama dated 8th December, 2005 on instructions given by one Subramanyam. It is not the case of the Petitioner that the

statement of Subramanyam has not been served upon him. The said paragraph refers to a note book which shows the same findings. Consequently, the reference to the note book in paragraph 11 of the Detention Order is also a mere further reference to support the same findings already arrived at pursuant to the documents recovered on 30th November, 2005.

23. The Detaining Authority,therefore, concluded that the purported export cargo of pharmaceutical drugs was actually filled with soapstone powder and thereupon exported from Mhape godown, from the documents recovered on 30th November, 2005 itself.

---

24. The main case of the Petitioner is that the aforesaid documents being the statements of Sambhaji Desai, Jimmy and the panchanama dated 8th December, 2005 are vital documents which would have made the Detaining Authority reach a particular subjective satisfaction which were not listed in the list of documents furnished to the Petitioner. Mr. Khan on behalf of the Petitioner argued that the order stands vitiated by non-application of mind and results in violation of the Petitioner's fundamental rights in not enabling him to make an effective representation.

25. It may be mentioned that the core of the Detention Order came to be made after recovery of the aforesaid documents as well as samples of the goods actually tested by the test analysts report dated 10th January, 2006.

26. It will have to be seen whether based upon these facts it can be said that the documents referred and relied upon by the Detaining Authority where left to be mentioned in the list of documents supplied to the Petitioner and whether the Petitioner's rights came to be infringed. The aforesaid Detention Order and the documents read together shows the reliance placed upon the actual recovery of documents which came to be collated by the Officers of the Sponsoring Authority and the documents were placed before the Detaining Authority. The Detaining Authority came to a subjective satisfaction upon the analysis of such documents. Aside from those documents certain statements also came to be recorded. These only record certain admissions. These have not been actually relied upon to pass the Detention Order. The distinction is clear and unambiguous. The latter panchanama dated 8th December, 2007 is only an addition showing the same modus operandi in other similar transactions.

27. The reliance by Mr. Khan upon the judgment in the case

of **Kudiram Das Vs. State of West Bengal, 1974 Indlaw SC 467**. holding that the Detention Order must be of the authority itself and must not be the reproduction of the Sponsoring Authority is misplaced in this case. The argument of Mr. Khan that in this case non-listing of the aforesaid two statements and the panchanama dated 8th December, 2005 shows that the Detaining Authority has not applied its mind and has, without seeing those statements and the panchanama, sought to rely upon them showing that it is merely copied from the Sponsoring Authority's notes, cannot be accepted.

28. Mr. Khan placed much emphasis upon the similarity or distinction in the terms “refer to” and “relied upon” judgment in the case of **Kirti Kumar Chamanlal Kundaliya Vs. Union of India, AIR 1981 SC 1621** has been impliedly overruled in the case of **Powanammal Vs. State of Tamil Nadu, (1999)2 SCC 413** in which ; per majority, (Wadhwa J. dissenting) it was held that where a translation of a document in the language known to the detenue was not provided, it vitiated the Detention Order as that would tentamount to non communication of the grounds and non-provision of the opportunity to make an effective representation. However, in para 9 of that judgment it has been held that there is a distinction between these two aspects. The non-supply of

the documents relied upon by the Detention Authority would be fatal but not the non-supply of the documents merely referred to by him unless the detenu shows prejudice caused to him in making an effective representation by not getting the documents referred to by the Detention Authority. In this case, therefore, the aforesaid two statements and the panchanama which are referred to by the Detention Authority has not caused any prejudice to the Petitioner and nothing has been shown by the Petitioner. All the documents relied upon by the Detaining Authority to come to the subjective satisfaction about the fraudulent execution of the export documents and the actual diversion of the goods purported to be exported into local market and replaced by other goods for export makes out a case of detention as reflected in the Detention Order.

29. Further judgments relied upon by Mr. Khan himself go against the case of the Petitioner. Consequently the judgment in the case of **Shalini Soni Vs. Union of India, AIR 1981 SC 431** shows that the Detention Authority entrusted with the subjective satisfaction of the statutory functionary carries an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and remote. Consequently the relied upon documents must be communicated to the detenu. Similarly

in the case of **Santosh Jugal Kishore Ginoria Vs. The State of Maharashtra in Writ Petition No.2220 of 2005**, the Division Bench of this Court, upon referring to various earlier judgments found that it was unnecessary to file copies of document to which casual or passing reference has been made in the Detention Order.

30. Mrs. Pai on behalf of the Respondents drew our attention to the judgment of the Division Bench of this Court in the case of **Meena Mahendra Vakharia Vs. K.L. Verma, 1997 ALL MR (Cri.) 1172** which relied upon inter alia the case of **Kudiram Das** supra and various other judgments and concluded that the basic documents or the documents which contain the pith and substance of primary facts which are the basis of the grounds of detention must be communicated to the detenu. Each and every document, howsoever insignificant or inconsequential, and to which a mere reference is made in the grounds of detention are not required to be furnished to the detenu if it contains only subsidiary details of the grounds and if the basic facts are not disclosed therein.

31. We find that in this case all the relevant documents relied upon by the Detaining Authority are served upon the Petitioner. The documents are intelligently collated and,

they are placed before the Detaining Authority. The Detaining Authority has considered and dissected those documents. The Detention Order details the modus operandi of the Petitioner and allied firms and companies. The conclusion which came to be arrived at by the Detaining Authority, based upon the documents seized and the investigations effected by the officers of the Sponsoring Authority are placed before the Detaining Authority and have all been enumerated and considered in the Detention Order. Reliance is placed upon the aforesaid two statements of the further panchanama only to show the admissions of these aspects and further such transactions. The Detention Order shows the subjective satisfaction of the Detaining Authority as also admitted by the aforesaid two witnesses and repeated in the further panchanama. These are not the documents which the Detention Authority was liable to furnish to the Petitioner. The non-furnishing is not shown to have made any difference to the Petitioner or caused prejudice to him.

32. There is, therefore, no merit in the Petition. The Petition is dismissed.

33. The Rule stands discharged.

(SMT. ROSHAN DALVI, J.) **(DR. S. RADHAKRISHNAN, J.)**